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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

JAREK MOLSKI, Plaintiff and Appellant, v. EVERGREEN DYNASTY CORPORATION, Defendant and Respondent.	2d Civil No. B208988 (Super. Ct. No. 1172370) (Santa Barbara County)

Jarek Molski appeals from a post-judgment order awarding his attorney's fees in the amount of $6,659.15 after he prevailed on claims for violation of the California Disability Act and the Unruh Civil Rights Act. He contends that the trial court erroneously allocated hours to a settling co-defendant and abused its discretion by applying a negative multiplier to reduce the fee award. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant is disabled and uses a wheelchair. He visited the Mandarin Touch Restaurant twice in two years and encountered architectural barriers to restroom access. Respondent, Evergreen Dynasty Corporation, operated the restaurant. Its co-defendants, Brian and Kathy McInerney (collectively McInerney), owned the property.

Appellant and his co-plaintiff, Disability Rights Enforcement, Education, Services: Helping You Help Others, a California public benefit corporation (DREES), filed a disability discrimination action in federal court against respondent and

McInerney asserting causes of action for violation of (1) the Americans With Disabilities Act (42 U.S.C. § 12101 et seq., the ADA); (2) the Disabled Persons Act (Civ. Code, § 54, the CDPA);[1] (3) Health and Safety Code section 19955 (denial of accessible sanitary facilities); (4) the Unruh Civil Rights Act (§ 51); and (5) Business and Profession Code sections 17200 et seq.

The district court dismissed the ADA cause of action for injunctive relief as a sham used as a pretext to gain access to the federal courts. It declined to exercise supplemental jurisdiction over the four state law causes of action that remained, declared appellant and his counsel to be vexatious litigants and entered pre-filing orders against them.

Immediately after the district court's dismissal order, appellant filed this state court action, asserting the same four causes of action. The trial court granted demurrers and a motion to strike, eliminating appellant's claims for punitive damages, daily damages, injunctive relief, violation of Health and Safety Code section 19955, and all causes of action of DREES. The trial court also declared appellant and his counsel to be vexatious litigants and entered a pre-filing order.

Two causes of action remained for trial: violation of the CDPA and violation of the Unruh Civil Rights Act. McInerney entered into a good faith settlement with appellant on the day before trial for $14,950.00. The settlement did not apportion recovery between damages and attorney's fees.[2]

The case proceeded to trial against respondent. The jury awarded appellant the minimum damages required by statute: $1,000 for unintentional

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[1] All statutory references are to the Civil Code unless otherwise stated.

[2] The settlement agreement does not appear in the record. Counsel for McInerney submitted a declaration representing under oath that the settlement agreement between appellant and McInerny provided that "the entire settlement payment of $14,950 is available as a set-off to reduce any judgment for damages and attorney's fees subsequently entered against [respondent] under . . . Code of Civil Procedure [section] 877, [subdivision] (a)."

discrimination in violation of the CDPA on January 25, 2003, and $4,000 for intentional discrimination in violation of the Unruh Civil Rights Act on January 28, 2005. (§§ 54.3 & 52, respectively.)[3]

Within 15 days of mailing of the notice of entry of judgment, appellant filed a motion for attorney's fees and costs. He did not file or serve a memorandum of costs. (Cal. Rules of Court, rule 3.1700(a)(1).) He requested attorney's fees in the amount of $114,895.00 and costs in the amount of $27,441.35. The court requested supplemental briefing and further hearing on how the settlement should impact recovery and the impact of a recent decision concerning the recovery of expert witness fees. (*Olson v. Automobile Club of Southern California* (2008) 42 Cal.4th 1142.) Both parties submitted supplemental briefing.

The trial court awarded $6,659.15 in fees and no costs. The court determined the amount of fees by multiplying the number of hours reasonably spent in pursuit of claims against respondent by the reasonable hourly rate for similar services in the community, $66,591.50, and then applied a negative multiplier of .10 on factors including the lack of novelty or difficulty of the case, the limited success and skill displayed, and the absence of any evidence that other work was precluded, among other factors.

DISCUSSION

Attorneys' Fees

Appellant was entitled to an award of fees as a matter of statutory right. (§§ 52, 54.3.) The sole contested issue was the amount of the award. He contends that the court erred when it allowed only half of the hours spent before trial and when it used a negative multiplier to reduce the fees by one-tenth. We reject the contention.

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3 The Supreme Court subsequently decided that proof of intentional discrimination is not required for recovery under the Unruh Civil Rights Act if the discrimination constitutes a violation of the ADA. (*Munson v. Del Taco, Inc.* (2009) 46 Cal.4th 661, 678, overruling *Gunther v. Lin* (2006) 144 Cal.App.4th 223 and *Coronado v. Cobblestone Village Community Rentals* (2008) 163 Cal.App.4th 831.)

The amount of fees to be awarded is within the broad discretion of the trial court, which is in the best position to judge the value of services rendered in its court. (*Serrano v. Priest* (1977) 20 Cal.3d 25, 49. We interfere with such a determination only if there is a manifest abuse of discretion. (*Fed-Mart Corp. v. Pell Enterprises, Inc.* (1980) 111 Cal.App.3d 215, 228.) The court's "discretion may not be exercised whimsically, and reversal is required where there is no reasonable basis for the ruling or when the trial court has applied the wrong test to determine if the statutory requirements were satisfied." (*Flannery v. California Highway Patrol* (1998) 61 Cal.App.4th 629, 634.) It is the burden of the party challenging the award to demonstrate error. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1140-1141.)

The trial court followed the correct methodology to calculate the award. Determination of a reasonable fee award begins with a "lodestar" figure: the product of the number of hours reasonably spent and a reasonable hourly rate. (*PLCM Group v. Drexler* (2000) 22 Cal.4th 1084, 1095.) The lodestar figure may then be adjusted using a negative or positive multiplier based on case-specific factors, to reach the fair market value of the services rendered. Factors to be considered include, "(1) the novelty and difficulty of the questions involved, (2) the skill displayed in presenting them, (3) the extent to which the nature of the litigation precluded other employment by the attorneys, (4) the contingent nature of the fee award." (*Ketchum v. Moses, supra*, 24 Cal.4th at p. 1132.)

The lodestar figure calculated by the trial court was supported by the evidence and reflects objectivity. It used counsel's time records as a starting point to determine the reasonable number of hours. (*Ketchum v. Moses, supra*, 24 Cal.4th at pp. 1132-1133.) The court disallowed hours charged for word processing and, over respondent's objection, allowed hours for work performed in the federal action.

The trial court reduced by half the hours spent before the McInerney settlement. Division of the pre-settlement hours was supported by the court's finding that the work in that time period was of equal benefit to the cause against respondent and the cause against McInerney. The record supports the finding. The claims against

respondent and the McInerneys were identical. Their liability was joint and several. No evidence supported appellant's assertion that the billing records already excluded time spent in the cause against McInerney. In *Californians for Responsible Toxics Management v. Kizer* (1989) 211 Cal.App.3d 961, cited by appellant, a trial court did not abuse its discretion when it awarded all hours spent pursuing both the settling and nonsettling defendant. However, the court acknowledged that a trial court has discretion, when appropriate, to disallow the hours spent in pursuit of the settling defendant. (*Id.* at p. 977, fn. 7.) Reduction was appropriate in this case.

The trial court's decision to adopt lower hourly rates within the range of rates requested was also within its discretion. Appellant requested fees at rates that increased during the five years of litigation. The court found that the lower rates reflected generally prevailing rates in the community for attorneys of similar experience. "The amount of attorney fees is within the sound discretion of the court and will not be reversed in the absence of a showing of clear abuse of that discretion." (*Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 997, disapproved on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664.) The court did not abuse its discretion when it adopted the lower rates.

The court's application of a negative multiplier was also within its discretion and reflected consideration of each relevant factor. The trial court has "discretion to consider all of the facts and the entire procedural history of the case in setting the amount of a reasonable attorney's fee award." (*Meister v. Regents of University of California* (1998) 67 Cal.App.4th 437, 452.) The purpose of a multiplier is to objectively reach an award that is equivalent to the fair market value of services rendered. We agree entirely with the trial court that the lodestar figure of $66,591.50 did not reflect the fair market value of services rendered.

This case was not novel or particularly difficult. It was one of hundreds of nearly identical cases filed by appellant and his counsel. An ADA case "often involves" difficult issues of proof and that assessment of damages "may additionally

require" proof of intentional conduct, but appellant did not submit the trial transcript, and the record is devoid of any evidence to contradict the court's finding that this case was not particularly difficult. Appellant contends that the number of similar cases establish counsel's experience which should have increased, not decreased, the fee award. Counsel's experience was considered separately when the court fixed the reasonable hourly rate. The court did not err when it considered the number of similar cases to determine the issue of novelty.

Counsel was not skillful. He over-pled the case. He sought daily damages which were unauthorized by law. He filed claims in the district court that should to have been pursued in state court. Appellant's counsel sent a demand letter that contained false advice regarding insurance coverage and led to vexatious litigant findings against himself and his client in federal and state court. Contrary to appellant's assertion, the trial court was aware of the circumstances surrounding the federal dismissal. The trial court took judicial notice of the orders of the federal court, which included its finding that the claim for injunctive relief was a sham and was made only to obtain federal jurisdiction in order to intimidate respondent.

The fee was contingent, but counsel's risk of nonpayment was not great because an award of fees was mandatory upon proof of a code violation. Counsel was not precluded from pursuing other employment as evidenced by the hundreds of cases filed during the pendency of this action. It is clear from the district court records that counsel did not suffer without income during the litigation. In 2004 alone, counsel settled 65 similar cases, 43 of which settled for a total of $837,300.

Appellant's success was very limited. The trial court may adjust an award downward to account for limited success. (*Harman v. City and County of San Francisco* (2007) 158 Cal.App.4th 407, 425.) Civil rights cases often involve small potential recovery. In such cases, the fees should not be reduced to a percentage of the actual recovery without regard for the actual fees incurred. (*Graciano v. Robinson Ford Sales, Inc.* (2006) 144 Cal.App.4th 140, 164 [in Consumers Legal Remedies Act action, court erred by applying a .3 negative multiplier to achieve an acceptable

contingent fee of settlement recovery without considering actual hours and other factors].)

Here, the trial court did not reduce the fees to a percentage of the recovery. It considered the actual fees incurred and all of the appropriate adjustment factors. The finding of limited success was based not only on the fact that appellant received only the required statutory minimum recovery, but also on other limitations on his success. Appellant did not prevail on his causes of action for violation of the Health and Safety Code or the Business and Professions Code. His request for daily damages of $4,000 per day from January 25, 2003 (including a claim that almost $1.5 million had accrued before the case was even filed) was dismissed, as were his claims for punitive damages and injunctive relief. Treble damages were authorized by the statute but were not awarded by the jury. (*Graciano v. Robinson Ford Sales, Inc., supra*, 144 Cal.App.4th at p. 164.) Furthermore, adverse orders were entered enjoining appellant and his counsel from filing complaints in the district or superior courts without prior permission. The court was within its discretion when it considered these limitations on appellant's success to determine that a downward adjustment was necessary to achieve the fair market value of services rendered.

Costs

Appellant contends that the trial court erred because it did not consider the request for costs contained in appellant's noticed motion for attorney's fees. We disagree.

Appellant was not entitled to costs because he did not file a memorandum of costs. A prevailing party who claims costs must serve and file a memorandum of costs within 15 days after the date of mailing of the notice of entry of judgment, or other deadlines not applicable here. (Cal. Rules of Court, rule 3.1700(a)(1).) The requirement of a cost memorandum is mandatory. (*Sanabria v. Emery* (2001) 92 Cal.App.4th 422, 426.) A prevailing party waives its entitlement to costs by failing to timely file. (*Hydratec, Inc. v. Sun Valley 260 Orchard & Vineyard* (1990) 223 Cal.App.3d 924, 929.)

DISPOSITION

The judgment is affirmed. Respondent is awarded its costs on appeal.

NOT TO BE PUBLISHED.

COFFEE, J.

We concur:

GILBERT, P.J.

PERREN, J.

Timothy J. Staffel, Judge

Superior Court County of Santa Barbara

Thomas E. Frankovich for Plaintiff and Appellant.

Robert H. Appert for Defendant and Respondent.